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Nos. 87-1514 and 87-1719

In the Supreme Court of the United States

OCTOBER TERM, 1987

ARMCO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

UNITED STEELWORKERS OF AMERICA, AFL-CIO AND ITS LOCAL 1865, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board abused its discretion in finding that certain employees continued to comprise a separate appropriate bargaining unit and therefore could not properly be accreted into the steel works bargaining unit of the steel manufacturer that acquired the coke plant where they worked.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is reported at 832 F.2d 357. The decision and order of the National Labor Relations Board (Supp. App. 2-11), together with the findings and recommendations of the administrative law judge (Supp. App. 12-141), are reported at 279 N.L.R.B. No. 143.

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[1] "Pet. App." refers to the appendix to the petition in No. 87-1514.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1987. Timely petitions for rehearing and suggestions for rehearing en banc were denied on February 4, 1988. The petition for a writ of certiorari in No. 87-1514 was filed on March 12, 1988; the petition for a writ of certiorari in No. 87-1719 was filed on April 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For approximately 35 years, Allied Chemical Corporation (Allied) produced coke in a plant in Ashland, Kentucky (Pet. App. 2a). The plant has a production capacity of approximately 2800 tons per day (*id.* at 3a). During 1981, however, it produced only about 500 tons per day and, as a consequence, nearly two thirds of its hourly employees, all of whom were represented by the Oil, Chemical, and Atomic Workers International Union, AFL-CIO (OCAW), were on layoff (*ibid.*). Almost all of the 500 tons of daily production was sold to petitioner Armco, Inc., which operated a nearby steel mill that used about 2800 tons of coke per day, the remainder of its coke needs being satisfied by other open market purchases (*id.* at 2a-3a). Armco's employees were represented by petitioners United Steelworkers of America, AFL-CIO, and its Local 1865 (Steelworkers) (*id.* at 3a).

In late 1981, Armco entered into negotiations with Allied to purchase the Ashland coke plant (Pet. App. 3a). After a tentative agreement was reached, Armco notified the Steelworkers and the OCAW that it intended to retain Allied's coke plant employees, to treat them as an accretion to the existing Steelworkers unit at the steel mill, and to apply the extant Steelworkers contract to them (*id.* at

3a-4a). Steelworkers, but not OCAW, ultimately agreed both to this arrangement and to have the seniority of Allied's employees run from the effective date of Armco's acquisition of the coke plant (*id.* at 4a-5a).

Armco then began conducting orientation meetings for Allied's employees, which local officers of Steelworkers attended (Pet. App. 4a; Supp. App. 72-73). At these meetings, Armco officials distributed Steelworkers' dues checkoff and authorization cards and, together with Steelworkers officials, told the employees that they risked discharge if they refused to sign the checkoff authorizations (Pet. App. 4a). The employees signed the checkoff authorizations, but objected to representation by Steelworkers (*ibid.*).

Armco's purchase of the coke plant became effective on December 31, 1981, and it commenced operations on January 2, 1982, using the same machinery, equipment, and production methods that Allied had previously used at the plant (Pet. App. 4a-5a). All of the hourly employees employed at the plant were former employees of Allied; and a substantial majority of the supervisors employed there were former Allied supervisors (Supp. App. 71). The superintendent of the plant had been its manager under Allied, and Armco assigned him responsibilities similar to those assigned to other Armco department heads (Supp. App. 91 & n.26). The employees performed essentially the same work for Armco as they had performed for Allied (Supp. App. 94); indeed, Armco decided to retain the existing work force at the coke plant precisely because its own employees were not trained to operate a coke oven (Supp. App. 53-54).

Armco treated the coke plant and the steel mill as distinct components of its steel manufacturing operations (Pet. App. 10a-11a). It used different job classifications at the two facilities (Supp. App. 93). It declined to transfer

employees between them (Supp. App. 91). Indeed, of the 2700 steel mill employees, 550 of whom were maintenance employees, only 24 employees—all maintenance employees—ever had any on-the-job contact with the coke plant's employees; and the same 24 employees were always assigned to perform the maintenance work at the coke plant in order to comply with OSHA regulations relating to carcinogenic conditions there (Supp. App. 93-94, 105-106, 117). Finally, Armco had the coke plant employees punch a separate time clock and use a separate telephone line and credit union; and the coke plant was approximately five miles fom the steel mill (Supp. App. 121, 122).

2. The coke plant employees remained unhappy with Armco's decision to apply the Steelworkers collective bargaining agreement to them (Pet. App. 5a). Accordingly, in April 1982, they urged OCAW to demand that Armco bargain with it as their representative (*ibid.*). When Armco refused to do so, OCAW filed unfair labor practices charges against Armco and Steelworkers with the National Labor Relations Board (*id.* at 6a).

After a hearing, an administrative law judge (ALJ) held that Armco had violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (NLRA or the Act) (29 U.S.C. 158(a)(1), (2), and (3)) by recognizing and entering into a contract with Steelworkers covering the coke plant employees, a majority of whom Steelworkers did not represent, and that Steelworkers had violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. 158(b)(1)(A) and (2)) by accepting recognition and entering into a contract with Armco in these circumstances (Supp. App. 130-131). In addition, the ALJ held that Armco and Steelworkers had violated the above sections of the Act by requiring the coke plant employees, as a condition of their employment, to execute Steelworkers' dues checkoff and authorization

cards (Supp. App. 131). Finally, the ALJ held that Armco was a successor-employer with respect to the coke plant; that Armco was accordingly obligated to bargain with OCAW as the exclusive representative of the coke plant employees; and that Armco had violated Section 8(a)(1) and (5) of the Act (29 U.S.C. 158(a)(1) and (5)) by refusing to bargain with OCAW and by unilaterally changing the terms and conditions of employment of the coke plant employees (Supp. App. 131).

The ALJ rejected (Supp. App. 99-123) petitioners' contention that the coke plant employees were an accretion to the steel works unit and thus had not maintained their status as a separate appropriate bargaining unit. The ALJ noted that the accretion of employees into an existing bargaining unit is appropriate only " 'when such community of interest exists among the entire group that the additional employees have no separate unit identity' " (Supp. App. 103 (citation omitted)). The ALJ then found (Supp. App. 121-122) that the coke plant employees had in fact maintained a separate group identity after Armco took over the coke plant's operations, noting (*ibid.* (footnote omitted)) that

> [b]y virtue of their separate existence, separate location, and separate collective-bargaining history before the purchase, coke facility employees enjoyed a community of interest separate from the Works. In my opinion, in view of the functional distinctness, different skills and training, different work environment, geographical separation, general lack of personal contact with works employees, and partial autonomy, coke plant employees continue to have a community of interest separate from the Works employees. Their separate community of interest has not been submerged into any broader community of interest because there is no high degree of integration of the two * * *.

The ALJ also rejected Armco's contention that a separate unit was inappropriate here because "the coke facility has become an intimate part of Armco's continuous production of steel" (Supp. App. 119). He explained (Supp. App. 120-121 (footnotes omitted)) that:

> While * * * the coke moves directly from the coke facility to the blast furnace, the coke, like the iron ore and limestone, is nothing more than a material used in steelmaking. The continuous process does not begin at the coke facility but rather at the blast furnace. Consequently, while some coke facilities may historically have become part of integrated steel works, some exist, as Allied did, separate from the steel mill and they are in effect nothing more than suppliers of a material used in steelmaking. Coke may be an essential ingredient in steelmaking but the coke facility and its employees are not an essential part of the continuous production process. Admittedly Armco at Ashland has become dependent on a supply of coke from the facility but that dependence does not make the facility part of the continuous process. What it does do is allow Armco to avoid having to stock pile large amounts of coke and assures the quality of coke Armco[] uses. But this * * * does not preclude the employees in the coke facility from being a separate appropriate unit. *Mallinckrodt Chemical Works* [162 N.L.R.B. 387 (1966)]. What were separate units do not automatically merge where integration is lacking.

3. The Board, with Chairman Dotson dissenting in part, adopted the findings and recommendations of the ALJ and ordered Armco and Steelworkers (a) to cease and desist from applying the Steelworkers contract to the coke plant employees and (b) to reimburse the coke plant

employees for the dues that they were illegally required to pay to Steelworkers (Supp. App. 2-11). The Board further ordered Armco, upon request by OCAW, to bargain with it as the exclusive representative of the coke plant employees; to restore the terms and conditions of employment that existed prior to Armco's unilateral changes; and to reimburse the employees for any monetary losses suffered as a result of those unilateral changes (Supp. App. 131-133).

4. The court of appeals, with one exception not pertinent here,[2] affirmed the Board's decision and enforced its order (Pet. App. 1a-16a). It noted (*id.* at 9a (citation omitted)) that, "[t]o determine whether two groups of employees should be included in the same bargaining unit, the Board applies a 'community of interests' test: the two groups must share a 'community of interests sufficient to justify their mutual inclusion in a single bargaining unit.' " The court then noted (*ibid.*) that "[t]his test consists of several factors: (1) similarity in skills, interests, duties, and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer's organizational and supervisory structure; (4) the bargaining history; and (5) the extent of union organization among the employees." And it added (*id.* at 9a-10a) that the Board's "ultimate determination as to the appropriate unit must be upheld unless it is arbitrary, unreasonable, or an abuse of discretion." The court concluded (*id.* at 10a) that "the Board's finding that the coke workers constituted a separate, appropriate

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[2] The court refused to require Armco to make the coke plant employees whole for the earnings that they lost due to Armco's unlawful conduct; rather, it remanded this aspect of the case to the Board for further proceedings (Pet. App. 15a-16a). No issue concerning this aspect of the court's judgment is raised here.

bargaining unit was not arbitrary, not unreasonable, and not an abuse of its discretion."

In reaching this conclusion, the court placed special emphasis on "[t]he administrative law judge's conclusion that the two employee groups had dissimilar skills, duties, and working conditions" (Pet. App. 10a). The court found that this conclusion was "clearly supported by substantial evidence" (*ibid.*), stressing that "[a]ll parties have acknowledged that the coke workers possess different skills, and that they work in a more hazardous environment than most steelworkers" (*ibid.*). The court was not "persuaded" by petitioners' contention that the two bargaining units were "functional[ly] integrat[ed]" (*ibid.*), noting (*id.* at 11a) that "the coke workers unit was an independent, separate plant with a long bargaining history and a long union relationship," that the acquisition of the coke plant by Armco had changed nothing about the plant's operations or the composition and tasks of the workforce, and that there was no employee interchange between the plants. The court similarly rejected (*id.* at 12a) petitioners' contention that the pattern of bargaining in the steel industry precluded a finding that separate bargaining units were appropriate, stating that there is no case "in which a previously-independent coke plant has been acquired and the employees accreted to a pre-existing steelworkers bargaining unit." Finally, it discounted the fact that Armco had demonstrated uniformity in wages, hours, and terms of employment between the coke workers and the other Armco employees (*ibid.*), reasoning that "the uniformity * * * is the result of the disputed conduct: the application of the Steelworkers' contract to the coke plant employees" (*id.* at 13a).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is unwarranted.

1. Section 9(b) of the Act (29 U.S.C. 159(b)) empowers the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *." In this case, the Board found, as a factual matter, that the same employees continued to perform the same work at the coke plant; that the coke plant employees used the same machinery and production methods and worked under the same supervisors; that employee interchange between the coke plant and the steel mill was practically nonexistent; that there was virtually no on-the-job contact between coke plant employees and other Armco employees; and that the skills, training, and job classifications of the coke plant employees were significantly different from those of the steel mill employees. In view of the "functional distinctness, different skills and training, different work environment, geographic separation, general lack of personal contact with works employees, and partial autonomy" of the coke plant employees (Supp. App. 121-122 (footnote omitted)), it was entirely reasonable for the Board to conclude that the coke plant employees continue to have a separate group identity and that they could not be accreted into the steel works unit.[3]

[3] Petitioners do not dispute that, if the coke plant employees remained a separate appropriate unit, the Board would be justified in treating Armco as a successor to Allied's bargaining obligation. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 15-16; *NLRB* v. *Burns Int'l Security Services, Inc.*,

The court below accordingly had no choice but to affirm the Board's decison. See *South Prairie Constr. Co.* v. *Local 627, Int'l Union of Operating Engineers,* 425 U.S. 800, 805 (1976); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947).

2. Petitioners nevertheless contend (Armco Pet. 7-13; Steelworkers Pet. 6-8) that the court below erred in approving the Board's refusal to treat the coke plant operations as part of a continuous manufacturing process and that the decision below thus conflicts with decisions of the Fourth and Seventh Circuits. This contention raises a fact-bound issue that does not warrant review by this Court and, in any event, is meritless.

The court below was plainly justified in upholding the Board's finding that the coke plant was not part of a continuous process of producing steel. As the ALJ stated (Supp. App. 120-121 (footnote omitted)), in this steel manufacturing system, "[t]he continuous process does not begin at the coke facility but rather at the blast furnace." Thus, as the ALJ further noted (*ibid.*), "while some coke facilities may historically have become part of integrated steel works, some exist, as Allied did, separate from the steel mill and they are in effect nothing more than suppliers of a material used in steelmaking." And, finally, as the ALJ also noted (*ibid.* (footnote omitted)), while Armco's acquisition of the coke plant may have increased its dependence on a supply of coke from that facility, it did not make the coke facility and its employees "an essential part of the continuous production process" of steel—at least not to any greater extent than they were at

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406 U.S. 272, 280 n.4 (1972). Nor do petitioners dispute that employees who constitute a separate appropriate unit cannot be treated as an accretion to another unit and be forced to accept that unit's bargaining representative without a Board-supervised election. See *Melbet Jewelry Co.*, 180 N.L.R.B. 107, 110 (1969); accord *Meijer, Inc.* v. *NLRB*, 564 F.2d 737, 740, 742-743 (6th Cir. 1977); *Penn Traffic Co.* v. *NLRB*, 546 F.2d 677 (6th Cir. 1976).

the time Allied owned the plant. In short, the steel and coke production processes are not integrated, and separate bargaining units are appropriate. See *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387 (1966).[4]

The decision of the Fourth Circuit in *NLRB* v. *Harry T. Campbell Sons' Corp.*, 407 F.2d 969 (1969), is not to the contrary. In that case, the Fourth Circuit held that a calcite operation was integrated with other operations of the employer and therefore that separate units were inappropriate. But the calcite operation at issue there was within 35 feet of the employer's other operations. Moreover, the calcite operation's employees and other employees regularly worked together; and job classifications were uniform throughout the facility. In short, there

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[4] Petitioners err in suggesting (Armco Pet. 9; Steelworkers Pet. 6) that the Board has a history of finding plant-wide units to be appropriate in steel and similar industries. To be sure, the Board at one time had a special rule for steel and three other industries, under which integration of operations and the bargaining pattern in the industries were deemed to compel the conclusion that only an overall bargaining unit was appropriate. See *In re National Tube Co.*, 76 N.L.R.B. 1199, 1207 (1948) (steel); *In re Permanente Metals Corp.*, 89 N.L.R.B. 804, 811 (1950) (aluminum industry); *In re Weyerhauser Timber Co.*, 87 N.L.R.B. 1076, 1082 (1949) (lumber industry); *In re Corn Products Refining Co.*, 80 N.L.R.B. 362, 364-365 (1948) (wet milling-industry). In *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387 (1966), however, the Board determined that the "distinctions between industries" in the existing case law was "arbitrary" (*id.* at 396), and that it "inten[ded] to free [itself] from the restrictive effect of rigid and inflexible rules in making [its] unit determinations" (*id.* at 398). The Board therefore announced that future unit determinations would be made "only after * * * weighing * * * all relevant factors on a case-by-case basis," and that it would "apply the same principles and standards to all industries" (*ibid.*); *National Tube* and its progeny were overruled to the extent that they established a per se rule that only overall units were appropriate in certain industries—including steel.

was "an extraordinary degree of integration and interdependence" (*id.* at 977-978). The opposite is true here.

Nor is the decision of the Seventh Circuit in *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d 1087 (1984), inconsistent with the decision here. In *Continental Web Press*, the court found that "preparation and printing are successive stages in a single lithographic production process" (*id.* at 1091). The court based this finding on the fact that the two groups of employees were performing successive stages of a single operation, had similar skills, did similar work, received similar pay, and worked in adjacent areas of the same plant (*ibid.*). It thus remanded the case to the Board for further explanation of the decision to treat the pressmen and preparatory employees as comprising two identifiable groups (*id.* at 1092-1094). Here, on distinguishable facts, the Board has already provided such an explanation.

Petitioners suggest (Armco Pet. 10, 13; Steelworkers Pet. 7) that the decisions of the Fourth and Seventh Circuits turned on the ability of one group of striking employees to shut down an entire plant and that the same is true here. The decisions of those cases did not, however, turn on the fact to which petitioners point. The courts in those cases did note that one reason employees in an integrated production process are placed in a single bargaining unit is so that one group of employees in the operation cannot deprive the other employees of work by causing the operation to shut down. See *NLRB* v. *Harry T. Campbell Sons' Corp.*, 407 F.2d at 979; *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d at 1090. But the courts did not suggest that employee groups must be combined wherever there is a danger that a strike by one group of employees could shut down an entire plant and thus deprive another group of employees of work, a possibility that exists whenever there is more than one unit established in an industrial

plant – whether its production processes are continuous or not. Rather, the courts in those cases relied on the traditional "community of interests" test in deciding that separate bargaining units were not appropriate. See *NLRB* v. *Harry T. Campbell Sons' Corp.*, 407 F.2d at 977-978; *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d at 1091-1094. In any event, the record in this case does not support the suggestion that the coke plant employees could shut down Armco's steel mill operations. Prior to the purchase of the Ashland plant, Armco satisfied most of its coke needs through purchases on the open market. There is no reason to believe that it could not do so again.[5]

3. Petitioners next contend (Armco Pet. 12-13, 15-16; Steelworkers Pet. 8-11) that the court below erred in approving the Board's consideration of past bargaining history in its unit determination and that, as a consequence, its decision conflicts with the decision of the Seventh Circuit in *NLRB* v. *Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280 (1986). This contention is also without merit.

First of all, petitioner Steelworkers errs in suggesting (Pet. 8-11) that the Board and the court below subordinated the "community of interests" analysis to consideration of the past bargaining history of the coke workers. The Board merely considered whether the coke plant employees' previous status as a separate appropriate bargaining unit had been negated by their integration into the larger Armco workforce; it concluded, based on a

[5] The cases that petitioners cite (Armco Pet. 13 n.10; Steelworkers Pet. 7 n.5) for the proposition that separate units are disfavored where a work stoppage is likely to have an immediate and adverse impact on production involve situations where the adverse impact flows from the integration of the operations, and not, as here, from the resulting reduced supply of a commodity used in the production process.

variety of factors, that Armco's purchase of the plant had not done so. See Supp. App. 99-123. The court below did the same. While it stated that the coke employees' "long bargaining history and * * * long union relationship [with OCAW] * * * alone suggests the appropriateness of a separate bargaining unit" (Pet. App. 11a), it did not in fact rely on that factor alone; rather, it looked to several factors—including the similarity of the employees' skills, interests, duties, and working conditions; the functional integration of the plants; and the employer's organizational and supervisory structure—and upheld the Board's multifactored analysis. See *id.* at 9a-13a. The "community of interest" analysis plainly was not subordinated to past bargaining history.

Petitioners are similarly mistaken in suggesting (Armco Pet. 15-16; Steelworkers Pet. 9-10) that past bargaining history is irrelevant to the determination of a separate appropriate unit in a successorship situation. Athough *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272, 280 (1972), holds that a purchaser may make operational changes of such magnitude as to render a pre-existing unit inappropriate, the Court in that case also cited with approval (*id.* at 281) the Fifth Circuit's decision in *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1165 (1970), which expressly held that bargaining history is a relevant factor for consideration in a successorship context and that the successor has the burden of demonstrating that its changes have destroyed the separate identity of the prior bargaining unit. Indeed, last Term, in *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 15, this Court made clear that, in a successorship situation, the continuing appropriateness of previous representation is to be assessed from "the employees' perspective" and must be "based upon the totality of the circumstances," which obviously includes past bargaining history.

The Seventh Circuit's decision in *NLRB* v. *Indianapolis Mack Sales & Service, Inc., supra*, does not suggest that past bargaining history cannot be considered in such situations. To be sure, the court there held that past bargaining history cannot be the sole basis upon which a separate unit determination rests. See 802 F.2d at 285-286. But the court also held that past bargaining history is a factor to be considered in determining whether a newly acquired unit remains appropriate. See *ibid.* That is precisely the approach that the Board and the court below took in this case.

4. Petitioner Armco also errs in asserting (Pet. 13-16) that "economic factors"—more particulaly, the employer's unified "economic mission" after acquisition—are central to the "community of interest" analysis. To give decisive weight to these factors would preclude less than plant-wide units from being found appropriate in any context, not just in the successorship situation. That result would conflict with Section 9(b) of the Act, which permits the Board to establish smaller than plant-wide units in order that employees will have the fullest freedom to select a representative of their choice.

5. Finally, petitioners cry "wolf" in suggesting (Armco Pet. 13-18; Steelworkers Pet. 11-12) that the decision below will unduly discourage acquisition of failing businesses and deter successor employers from retaining their predecessors' employees. Where it has a legitimate business reason,[6] a successor-employer may decide not to retain an existing workforce and, instead, to hire and train an entirely new one. But where it chooses to retain the pre-

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[6] Under the labor laws, a successor employer may not, of course, refuse to hire the predecessor's employees merely to avoid recognizing their bargaining representative. See *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. at 279-280 & n.5; *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 262 n.8 (1974).

existing work force (and to avoid the expense associated with hiring and training a new one), the successor-employer is not free to "thwart[]" the employees' "legitimate expectations in continued representation by their union" merely because it fears that separate representation will give those employees undue economic leverage. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, slip op. 15. On the contrary, separate appropriate representation is a right granted those employees by the NLRA, and the employer must respect it; as this Court has said, industrial strife is more likely to result from frustration of the "legitimate expectations" of the employees in continued representation than from any leverage that may flow from recognizing their right to separate representation. See *ibid.*; accord *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 (1973).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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